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In the Supreme Court of the United States

No. 73-6241

KENNETH THORPE,
Petitioner,

vs.

CITY OF KANSAS CITY, MISSOURI,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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STATEMENT OF THE CASE

During the first two weeks of September, 1970, East High School in Kansas City, Missouri, had been the scene of frequent disturbances (R. 26, 51, 73). These disturbances had been, at least in part, racial in nature (R. 62, 69). The disturbances had included fights both inside and outside of the school building (R. 26, 74). After classes, large segregated groups of students had been congregating in the East High area, especially on the corners of 20th and Van Brunt where white students congregated (R. 63) and at 20th and Denver where black students congregated (R. 62). These corners were close together (R. 70, 76). For at least a week (R. 27, 42, 74) officers of the Kansas

City, Missouri, Police Department had been trying to prevent further disturbances by patroling the area (R. 17) preventing the students from congregating in large groups (R. 26, 27) and shepherding the students away from the school when classes let out (R. 51, 71). The situation was such that on the day upon which these charges arose there were three members of the City's Department of Human Relations in attendance (R. 65) and a large number of policemen (estimated at eighteen) in the immediate area (R. 14).

The incident out of which the charges in this case arose occurred after school was dismissed (R. 13) on September 18, 1970 (R. 12, 11). On that date there had been numerous disturbances (R. 12). Although the testimony is not precise about the time frame, it appears that at the time of appellant's arrest there was a large group of white students already gathering on the corner of 20th and Van Brunt (R. 68). The size of the crowd of white students was estimated at 150 (R. 62). There was also a smaller group of black students gathering at 20th and Denver (R. 68, 69). This crowd was variously estimated in size from 25 (R. 62, 69) to 40 (R. 15). At some point in time (witness Jaben's testimony was conflicting about whether it was contemporaneously with appellant's arrest (R. 70) or just after it (R. 66)), the white crowd started toward the black crowd. Some police officers headed for the white crowd while others attempted to disperse the black crowd (R. 70). There was a lot of loud talking (R. 24). It was noisy and there was a lot of commotion going on (R. 66). There was quite a lot going on (R. 79).

This was the setting for the acts leading to this charge.

On September 18, 1970, before school let out (R. 17), Officer Bishop Baker of the Kansas City, Missouri, Police Department was patroling in the area of East High School

with Officer Henry Ward (R. 26) because of the disturbances that had been occurring there (R. 12, 17). They were stopped by a security guard and requested to assist with the arrest of five persons (R. 17). They took the five persons into custody (R. 17) and waited at 20th and Denver in their police car for the paddy wagon (R. 18). When the paddy wagon arrived, students started to congregate and the officers asked them to move on (R. 19). By this time the students were getting out of school (R. 56). As noted previously, a large crowd of white students was gathering on 20th and Van Brunt (R. 68). After the five persons were placed in the paddy wagon, the officers moved across the street and started telling the group of students that had congregated there at 20th and Denver to move on down the street (R. 19). Most of them moved on, except for about fifteen students (R. 19). One young lady was asked specifically to move on and when she failed to do so, she was arrested (R. 13). While Officer Baker was trying to get the girl into the police car, a crowd of 25 to 40 people congregated around them (R. 14) and appellant arrived (R. 13). While Officer Baker continued to attempt to get the girl into the car (R. 20), appellant stood among the crowd on the other side of the police car door from Officer Baker (R. 27) repeatedly stating that Officer Baker could not arrest the girl (R. 15) or that it was not fair to put her under arrest (R. 53) in a loud (R. 55) very belligerent (R. 24) manner with his face six inches (R. 23) to eight inches (R. 54) from that of the police officer. He did not touch the officer (T. 25). He acknowledged that he was upset (R. 54). Appellant was told to move on a number of times (R. 15, 28) but he refused to do so (R. 15, 28). He was then arrested and charged with "disorderly conduct, by congregation with others on a public street and refusing to move on when ordered by the police with intent to cause a breach of the

peace" in violation of Section 26.10-C of the Revised Ordinances of Kansas City, Missouri (R. 3). While the officers were effecting appellant's arrest, the girl escaped (R. 16).

In certain details the appellant's evidence controverted the facts as set out above. In particular, appellant's evidence was that he had not been told to move on (R. 38, 58, 66). Part of the res gestae of the incident was testimony about a statement by the girl that she was waiting for a ride (R. 35). Appellant testified that they usually went to this area every day to get rides (R. 36) but subsequently testified that he wasn't there to get a ride (R. 42). Witness Vergil Crawford testified that they always walked home but usually stopped at this place to discuss school matters with friends (R. 57).

At the end of the trial, in a colloquy between counsel for appellant and the Judge, the Judge made what amounted to findings of fact (R. 83-86). He found that the order to move on had been given by Officer Baker (R. 86); that Officer Baker's testimony was credible (R. 85); that witness Jaben was telling the truth but did not hear the order due to the confusion (R. 85); and that "somebody is obviously not telling the truth" (R. 85) in a context which this writer understands to make it a clear reference to appellant. The Court convicted appellant and assessed a $20.00 fine (R. 86).

As to the facts of the appeal on the record, respondent adopts the final paragraph of appellant's Statement of Facts on pages 6 and 7 of his Petition for Certiorari.

ARGUMENT

Petitioner doesn't deal directly with the wording o the Kansas City ordinance in any great detail. Appar ently, his primary argument, stated as a syllogism, woul be: Ordinances are void if they forbid actions which ar protected by the First Amendment right of free speech this petitioner was convicted of violating the ordinanc for actions which are protected by the First Amendmer right of free speech; therefore this ordinance is void.

The first premise of the syllogism is undoubtedly co rect. Laws which purport to deny rights that are pro tected by the First Amendment are unconstitutional an void. *Terminello* v. *Chicago*, 337 U.S. 1, 69 S.Ct. 894, 9 L.Ed. 1131 (1949). If the second premise is correct, the petitioner may properly draw the suggested conclusion.

The argument by which petitioner seeks to establis the second premise, however, is built on sand for the re son that instead of reading the facts in this case as th law requires him to do, he has read them as he desire them to be. For this reason, respondent has gone in rather extensive detail in its statement of facts for th Court.

The law is clear that it is not the function of th court to second-guess the fact-finder and substitute its i terpretation of the testimony for his. So long as the re ord discloses substantial evidence of the facts supportin the verdict, the reviewing court should accept them. *Goo ing* v. *Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 4 (1972). In this case the facts supporting the verdict a that there was an explosive racial situation at the scho which had gone on for about two weeks and the poli were attempting to control it. Officer Baker made an a

rest and a hostile crowd gathered. Petitioner, a member of that crowd, was interfering with the arrest by repeating in a loud and belligerent tone that the officer couldn't make the arrest. He was doing this six or eight inches from the face of the officer. He was told to move on several times but refused to do so. Finally the officer placed petitioner under arrest. While the officer was dealing with petitioner the first arrestee escaped from custody. All of this occurred in an atmosphere of noise and commotion with a large group of white students gathering a short distance away and finally advancing in the direction of the group of black students around the police car. Petitioner blandly summarizes these facts at page 9 of his petition as, "the making of statements in response to police inquiries or commands to move on and an arrest solely because of those statements".

Hindsight is easier than foresight by a darned sight, but even at this comparatively remote vantage point in time, no really viable alternative to arresting petitioner comes to mind if Officer Baker intended under the existing conditions to carry out his duty of maintaining the peace.

The cases which petitioner seeks to analogize to his own simply do not stand up to close scrutiny. *Hess* v. *Indiana*, ... U.S. ....., ... S.Ct. ....., 38 L.Ed.2d 303 (1973) seems to be the case on which he places his primary reliance. Although petitioner states on page 10 of his petition that Hess was arrested for disorderly conduct when he "commented loudly on the actions of the officers", it was stipulated by both sides that petitioner's words were, "we'll take the fucking street later" and the evidence was uncontested that he spoke away from the officers rather than to them. 38 L.Ed.2d at 306. Since Hess's statement was actually an exhortation to comply with the orders of the police, at least for the present or, at worst, it was a call

to action at some indefinite future time, the court held, as petitioner points out, that the words were not likely to produce imminent disorder and a conviction stemming from the statement alone was violative of the First Amendment. If in the case at bar petitioner had been telling the crowd to "cool it" until later his situation might be analogous to that of Hess. He wasn't, however, and the analogy fails.

Petitioner then quotes from *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965) that citizens should not be subject to the "whim of any police officer." It is certainly not possible to argue about this abstract point of law. The trouble with petitioner's position is that he makes it applicable to this situation by ignoring the facts attendant on petitioner's arrest and ignoring the narrow construction put on this type of ordinance by Missouri Courts since many years before petitioner was even born. *City of St. Louis* v. *Slupsky*, 254 Mo. 309, 162 SW 155 (1913).

Petitioner cites *Norwell* v. *Cincinnati*, ... U.S. ....., ... S.Ct. ....., 38 L.Ed.2d 170, 173 (1973). In that case an old man was arrested when he was walking alone down the street at night. A police officer asked him where he was going and he walked away and said, apparently in a conversational tone, "I don't tell you people anything." For that he was charged with and convicted of violating an ordinance that said:

> "No person shall wilfully conduct himself . . . in a noisy, boisterous, rude, insulting or otherwise disorderly manner with the intent to abuse or annoy a person . . ." 38 L.Ed.2d at 172.

On these facts, with the detention being of the petitioner rather than of a third party, this Court said:

> "Upon this record, we are convinced that the petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him. Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." 38 L.Ed.2d at 173.

Once again, the abstract point of law is correct but, on the facts in this case, it simply doesn't apply.

Finally, petitioner quotes from *Thompson* v. *Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), a case where there was not a single shred of evidence to support a verdict and this court held the convictions violated due process. More fully quoted, the court said:

> "The only information the record contains on what the petitioner was 'argumentative' about is his statement that he asked the officers 'what they arrested me for.' We assume, for we are justified in assuming, that merely 'arguing' with a policeman is not, because it could not be 'disorderly conduct' as a matter of the substantive law of Kentucky." 4 L.Ed.2d at 659.

Thompson was arrested when he was in a tavern dancing alone, bothering no one, including the proprietor. The case is not in point to the facts at hand.

Petitioner slides over the *one* case which is *really in point* with the terse footnote "Thus, unlike the situation in *Colten* v. *Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), here there was no interference with traffic or other circumstances that justified the interference with petitioner's right to free speech."

In *Colten*, one of a group of demonstrators was being given a ticket for having an expired license plate. A num-

ber of other demonstrators, including Colten, stopped their cars, some in the roadway and gathered around. There was some obstruction to traffic. Colten, an officious intermeddler, made an effort to enter into conversation with the officer about the charge. Colten failed to leave after several requests to do so and was finally arrested and charged with violating the local ordinance which read:

> "(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse . . ." 32 L.Ed.2d at 589.

This court rejected the claim that Colten's actions were protected by the First Amendment guarantee of free speech:

> "Based on our own examination of the record, we perceive no justification for setting aside the conclusion of the state court that when arrested appellant was not engaged in activity protected by the First Amendment. Colten insists that in seeking to arrange transportation for Mendez and in observing the issuance of a traffic citation he was disseminating and receiving information. But this is a strained, near-frivolous contention and we have little doubt that Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment. Nor can we believe that Colten, although he was not trespassing or disobeying any traffic regulation himself, could not be required to move on. He had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a

> legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident. We cannot disagree with the finding below that the order to disperse was suited to the occasion. We thus see nothing unconstitutional in the manner in which the statute was applied." 32 L.Ed.2d at 589.

In light of the volatile situation in which the police officer in the instant case found himself, the order to move on and the subsequent arrest were even more "suited to the occasion" than they were in *Colten*.

The *Colten* case is dispositive of the question about whether petitioner's actions were protected free speech. They were not and consequently the arrest forms no basis for petitioner's conclusion that the ordinance is void.

Petitioner alludes rather generally to two more arguments for reversal. One of these is that there was no evidence of his intent. The *Colten* case also makes it clear that indirect evidence of intent is adequate, 32 L.Ed.2d at 589; there was ample evidence of intent in the instant case as the opinion of the Missouri Supreme Court, petitioner's appendix, p. 8, makes clear.

Finally, petitioner contends that the Kansas City statute is vague and overbroad, in that it allows for government by the moment-to-moment opinions of the policeman on his beat. Respondent can do no better in responding to this allegation than to call the court's attention to the opinion of the Missouri Supreme Court, petitioner's

appendix, pp. 3-7. The construction is part and parcel of the ordinance presented to this court, *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965) and this ordinance has been narrowly construed. It should be especially noted on page 5 of the Missouri Court's opinion that this interpretation is not newly announced. On the contrary it goes back to 1913; it had long been the law at the time of petitioner's trial.

All of petitioner's claims are clearly unsupported by either the law or the facts. The record discloses no federal question decided in a way not in accord with the applicable decisions of this court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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